

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of the left upper extremity causally related to his accepted employment injury.

FACTUAL HISTORY

On March 17, 2014 appellant, then a 50-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 1, 2014 he sprained his left shoulder when delivering mail to unplowed streets while in the performance of duty. OWCP accepted the claim for a sprain of the left shoulder at the rotator cuff, left shoulder impingement syndrome, and left biceps tendinitis. Appellant stopped work on February 8, 2014. OWCP paid him wage-loss compensation on the supplemental rolls until July 26, 2014 and on the periodic rolls beginning July 27, 2014.

On June 5, 2014 Dr. David M. Burt, a Board-certified orthopedic surgeon, noted appellant's history of an injury to his shoulder on February 1, 2014. He diagnosed severe shoulder arthritis and advised that he would require a total shoulder replacement.

On July 28, 2014 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the evidence to determine whether appellant required a left shoulder total arthroplasty causally related to appellant's employment injury. He advised that appellant had preexisting degenerative arthritis and would have required surgery in the absence of his employment exposure. Dr. Garelick recommended against surgical authorization.

On November 6, 2015 OWCP determined that a conflict existed between Dr. Burt and Dr. Theodore J. Suchy, an osteopath who provided a second opinion examination, regarding whether appellant had continued disability or the need for medical treatment causally related to his February 1, 2014 employment injury. It referred appellant to Dr. J.S. Player, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated March 3, 2016, Dr. Player found that appellant had no residuals of his February 1, 2014 employment injury. He opined that appellant had "unrelated and preexisting left shoulder osteoarthritis which was neither caused nor aggravated by the February 1, 2014 left shoulder soft tissue injury." Dr. Player found that appellant could return to his regular employment considering only appellant's accepted condition, but was disabled due to nonemployment-related left shoulder osteoarthritis. He further determined that he required no ongoing medical treatment due to appellant's work injury.

By decision dated March 20, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits as he had no further residuals or disability due to his accepted employment injury.

On March 27, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On June 22, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated June 26, 2017, OWCP requested that appellant submit an impairment evaluation from his attending physician addressing whether he had reached maximum medical improvement and providing an impairment rating based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

A telephonic hearing was held on September 5, 2017 regarding OWCP's termination of appellant's wage-loss compensation and medical benefits.

In a report dated September 11, 2017, based on an August 9, 2017 examination, Dr. Neil Allen, a Board-certified neurologist and internist, discussed appellant's history of a February 1, 2014 employment injury. He noted that appellant had previously undergone arthroscopic shoulder surgery in May 2012. Dr. Allen provided three range of motion (ROM) measurements for both shoulders and found full strength of the upper extremities with intact sensation. He determined that appellant had 15 percent permanent impairment of the left upper extremity due to loss of ROM using Table 15-34 on page 475 of the A.M.A., *Guides*.

By decision dated October 26, 2017, an OWCP hearing representative affirmed the March 20, 2017 termination decision.

On February 15, 2018 Dr. Herbert White, Jr., a Board-certified occupational medicine specialist serving as a DMA, opined that appellant had nine percent permanent impairment of the left lower extremity due to loss of ROM. He advised that his rating differed from that of Dr. Allen as Dr. Allen had failed to compare the reduced left shoulder motion to the unaffected right side. Dr. White further found five percent permanent impairment due to a left labral tear using Table 15-5 on page 404 of the A.M.A., *Guides*. As this was less than the impairment rating for loss of ROM, he concluded that appellant had nine percent permanent impairment of the left lower extremity.

OWCP determined that a conflict in medical opinion existed between Dr. Allen and Dr. White, the DMA, regarding the extent of appellant's left upper extremity impairment. It referred appellant to Dr. Steven J. Mash, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 13, 2018, Dr. Mash reviewed appellant's history of a February 1, 2014 employment injury and left shoulder surgery in May 2012. He noted that Dr. Burt had recommended a total left shoulder arthroplasty. On examination Dr. Mash found significant loss of ROM of the left shoulder. He advised that he agreed with Dr. Player that appellant's "left shoulder difficulty is not causally related in any way to the alleged injury of February 1, 2014." Dr. Mash consequently opined that appellant had no employment-related permanent impairment of the left upper extremity.

By decision dated December 19, 2018, OWCP denied appellant's schedule award claim. It found that the opinion of Dr. Mash as the impartial medical examiner (IME) represented the

³ A.M.A., *Guides* (6th ed. 2009).

special weight of the evidence and established that appellant had no permanent impairment of the left upper extremity as a result of his accepted employment injury.

On December 26, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on April 16, 2019. During the hearing, counsel argued that Dr. Mash had relied upon a 2016 report from Dr. Player that was stale and not relevant to determining the extent of permanent impairment. He asserted that Dr. Mash had failed to provide an independent opinion, but instead had relied upon the findings of other physicians. Counsel noted that the issue of entitlement to a schedule award differed from the issue of termination, and contended that the medical evidence addressing the termination was not probative regarding the schedule award issue.

By decision dated June 27, 2019, OWCP's hearing representative affirmed the December 19, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁴ and its implementing federal regulations,⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁶ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁷

A schedule award can be paid only for a condition related to an employment injury. It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function as a result of an employment injury.⁸

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a

⁴ *Id.*

⁵ 20 C.F.R. § 10.404.

⁶ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

third physician who shall make an examination.⁹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence, and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹¹ If the referral physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new IME examination.¹²

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP determined that a conflict in medical opinion arose between Dr. Allen, an attending physician who found that appellant had 15 percent permanent impairment of the left upper extremity and DMA Dr. White, who found that appellant had 9 percent permanent impairment of the left upper extremity. In order to resolve the conflict, it referred him to Dr. Mash for an impartial medical examination.

In a report dated September 13, 2018, Dr. Mash discussed appellant's February 1, 2014 employment injury and noted that appellant had a history of left shoulder surgery in May 2012. On examination he found loss of ROM of the left shoulder. Despite the SOAF, Dr. Mash indicated that appellant's left shoulder condition was unrelated to the February 1, 2014 employment injury. He, thus, found that appellant had no employment-related impairment of the left upper extremity.

It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. OWCP clearly accepted appellant's claim for a sprain of the left shoulder at the rotator cuff, left shoulder impingement syndrome, and left biceps tendinitis. When it has accepted an employment condition as occurring in the performance of duty, the physician must base his opinion on the accepted facts. In *Paul King*,¹³ the Board found that the report of an IME who disregarded a critical element of the SOAF was of diminished probative value. In *King*, the IME also disagreed with the medical basis for acceptance of a condition. The Board found that this defective report was insufficient to resolve the existing conflict of medical opinion evidence. Thus, the Board finds that Dr. Mash's report is similarly of diminished probative value.

⁹ 5 U.S.C. § 8123(a); *see also* 20 C.F.R. § 10.321.

¹⁰ *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020).

¹¹ *W.H.*, Docket No. 16-0806 (issued December 15, 2016); *supra* note 6 at Chapter 2.810.11(e) (September 2010).

¹² *Id.*; *see also* *R.W.*, Docket No. 18-1457 (issued February 1, 2019).

¹³ 54 ECAB 356 (2003).

For these reasons, Dr. Mash's opinion is insufficient to resolve the conflict in medical opinion as the special weight of the medical opinion evidence regarding this matter does not presently rest with his opinion and there is an unresolved conflict in the medical opinion evidence. On remand OWCP shall select a new IME for purposes of developing the schedule award claim.¹⁴ After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 11, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See *K.C.*, Docket No. 18-0234 (issued September 14, 2018).